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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:	Chapter 11
LONG ISLAND BANANA CORP.,	Case No. 8-14-71443-reg
Debtor.	

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LONG ISLAND BANANA CORP.,	
Plaintiff	
v.	
28 WILLIAM ST. CORP., JOHN BALDUCCI JR., JAMES BALDUCCI and CHRISTO CARAMBELES,	Adv. Pro. No. 14-08119
Defendants.	

---X

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff Long Island Banana Corp. ("Plaintiff," or the "Debtor"), by its proposed special counsel Herrick, Feinstein LLP, submits this memorandum of law in opposition to the Motion for Partial Summary Judgment (the "Summary Judgment Motion") [Docket No. 25] filed by Defendants 28 William St. Corp. (the "Landlord"), John Balducci, Jr., James Balducci, and Christos Carambeles (collectively, the "Defendants").

PRELIMINARY STATEMENT

The Summary Judgment Motion should be denied, largely for the same reasons this Court rejected their earlier motion to dismiss this adversary proceeding: summary judgment is appropriate where there are no undisputed issues of material fact and the moving party is entitled to judgment as a matter of law. Because the Defendants satisfy neither condition, their Summary Judgment Motion is fatally defective.

The state of the record illustrates the fundamental flaw in the Summary Judgment Motion. As Plaintiff set forth in its response to the Defendants' Rule 7056 statement and in the Declaration of Yolanda Hoey (the "Hoey Declaration") annexed thereto, there are numerous material factual disputes. Moreover, Plaintiff has not yet had an opportunity to develop a full record through discovery, which has been limited to date by order of this Court to the issue of whether the lease at issue was voluntarily surrendered. The presence of these disputed factual issues and the absence of a full record are sufficient grounds alone to deny the Summary Judgment Motion.

But contrary to Rule 56 (made applicable by Bankruptcy Rule 7056) and its caselaw, the Defendants ask, on the basis of their affidavits (largely from affiants who have not yet been fully deposed), that this Court resolve these factual disputes in their favor, which is not appropriate in a motion for summary judgment. In this regard, the Summary Judgment Motion repeats the error of the prior motion to dismiss. The Defendants' motion on this record is no better; because there are disputed factual issues, the Summary Judgment Motion wholly misconceives federal summary judgment practice and must be denied.

As set forth below, the Defendants' reliance on the voluntary payment doctrine to defeat the Second Claim for Relief on summary judgment is not supportable. The Debtor's overpayments of real estate taxes was due to a mistake of fact, which brings the Second Claim for Relief outside of the voluntary payment doctrine. The Defendants also misconstrue the caselaw concerning the statute of limitations and rely on an inapplicable, narrow exception for their request for summary judgment on the Second Claim for Relief. The Defendants are simply wrong about the statute of limitations. Lastly, the Defendants ignore the clear disputes of fact regarding the Sixth and Seventh Claims for Relief when they urge the Court to accept as true their version of events and grant them summary judgment.

STATEMENT OF FACTS

Plaintiff commenced this adversary proceeding by filing the Verified Complaint, dated April 19, 2014 (the "Complaint") [Docket No. 1], which asserts the following causes of action:

- First Claim for Relief: A determination that the lease dated January 1, 2003 (the "Lease") of 28 William Street, Lynbrook, New York (the "Premises") between the Landlord and the Debtor is valid and remains property of the Debtor's estate.

- Second Claim for Relief: Recovery from the Landlord of over $800,000 in tax overpayments made by the Debtor based on the Debtor's mistake of fact that all real estate taxes on the Premises were the obligation of the Debtor, when, in fact, the Lease required the Debtor to pay only tax increases from the 2002-2003 base tax.

- Third Claim for Relief: A determination of the amount necessary to cure defaults under the Lease in the event the Debtor seeks to assume the lease under section 365 of the Bankruptcy Code.

- Fourth Claim for Relief: Damages caused by the Defendants' unlawful self-help eviction of the Debtor from the Premises.

- Fifth Claim for Relief: Damages caused by the Defendants' actions, which resulted in the improper chilling of bids for the Debtor's assets.

- Sixth Claim for Relief: Judgment against the Defendants for interference with advantageous business relationships based on the Defendants' intentional actions to intimidate a post-petition investor of the Debtor, All Island Bananas Produce, Corp. ("All Island"), and attempt to deter All Island from investing in the Debtor.

- Seventh Claim for Relief: Judgment against the Defendants for unfair competition based on the Defendants' bad faith solicitation and employment of the Debtor's employees and appropriation of the Debtor's business assets.

- Eighth Claim for Relief: The equitable subordination of the Defendants' claims against the Debtor based on the Defendants' egregious misconduct.

- Ninth Claim for Relief: A permanent injunction against the Defendants, enjoining them from interfering with the Debtor's use of the Premises, competing with its business, and interfering with the Debtor's reorganization efforts.

- Tenth Claim for Relief: Sanctions on account of the Landlord's violation of the automatic stay for its post-petition service of an order to show cause in the state court landlord/tenant action with respect to the Premises pending at the time of the Debtor's chapter 11 filing.

The central dispute that is the subject of the Summary Judgment Motion involves the Debtor's mistaken overpayments of real estate taxes. On or about March 31, 2003, the Debtor as tenant executed the Lease with the Landlord, which provides that the Debtor shall pay, in addition to rent, all increases in real estate taxes from the base taxes for the tax year 2002-2003. Prior to the execution of the Lease, the taxing authorities mailed tax bills directly to the Premises and this practice continued after the execution of the Lease. The tax bills that the taxing authorities mailed to the Premises included all taxes due, and not just the tax increases. The Debtor paid these taxes in full, notwithstanding the provision in the Lease requiring only the payment of rent increases. The Debtor paid these taxes under a material mistake of fact, because at the time that each of the tax overpayments were made, the Debtor was not aware of the provisions of the Lease governing payment of real estate taxes.

The Debtor did not immediately receive a copy of the Lease after it was executed. It appears that the attorneys that were representing the Debtor during 2003, Trivella & Forte (then known as Trivella, Forte & Smith), mailed the Debtor a copy of the Lease on or about April 19, 2003, in an envelope containing transactional documents relating to the Hoey family's buyout of the Balducci family's interest in the Debtor. That envelope was misplaced and was not discovered until May 2014. The Debtor located the Lease at the bottom of a stack of papers in a credenza while unloading, among other things, the Debtor's books and records at the Premises following the Debtor's forced eviction from the Premises by the Landlord.

The Debtor had previously requested the Lease from the Landlord on several occasions, but the Landlord never responded to the Debtor's request. The Landlord itself has filed different versions of the Lease with this Court and in the state court landlord/tenant action, where one version provides for the Debtor's obligation to pay just the real estate tax increases, and another version requires the Debtor to pay all real estate taxes.

On May 16, 2014, the Defendants filed a motion to dismiss the complaint [Docket No. 6], which the Court largely denied, except to grant dismissal solely of the Fifth Claim for Relief. Undeterred, and with the bulk of discovery still not yet completed, the Defendants filed their defective Summary Judgment Motion, seeking summary judgment on the Second, Sixth and Seventh Claims for Relief.

To date, the depositions of defendants John Balducci, Jr. and James Balducci and all document and other discovery has been limited by order of this Court [Docket No. 24] in scope to the issue of whether the Debtor surrendered the Lease to the Landlord pre-petition by its conduct and/or by operation of law. Defendant Christos Carambeles has not yet been deposed at all. There has been no opportunity for non-party discovery, including such critical persons as John Balducci, Sr. Nor has Plaintiff had the opportunity to coordinate with counsel for non-party All Island to obtain testimony from the principals of All Island.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must satisfy the criteria set forth in Federal Rule of Civil Procedure 65, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In accordance with Rule 56, the facts are to be construed in the manner most favorable to the non-moving party, and the Court is to resolve all ambiguities and draw all reasonable inferences against the moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). "However, where there has been no opportunity for discovery, a court may either refuse the application for judgment or order a continuance." *Carruthers v. Flaum*, 365 F. Supp. 2d 448, 455 (S.D.N.Y. 2005).

ARGUMENT

The Summary Judgment Motion should be denied because the Defendants have failed to satisfy their burden to demonstrate there are no undisputed issues of material and they are entitled to judgment as a matter of law. There are numerous factual disputes, and the Defendants would have the Court resolve those factual disputes in their favor, contrary to the rule that factual disputes are to be resolved in favor of the non-moving party and reasonable inferences drawn against the moving party.

With respect to summary judgment on the Second Claim for Relief, the Defendants' reliance on the voluntary payment doctrine and the statute of limitations to bar the Second Claim for Relief misconstrues the law. The Defendants' seek summary judgment on the Sixth and Seventh Claims for Relief when they are fully aware (but choose to ignore) that genuine issues of material fact surround those claims. Lastly, the undeveloped factual record in this case, with discovery far from complete, requires the denial of summary judgment at this early stage of litigation.

I. SUMMARY JUDGMENT SHOULD BE DENIED ON THE SECOND CLAIM FOR RELIEF

The Court should deny summary judgment on the Second Claim for Relief because the voluntary payment doctrine does not apply where, as here, the tenant made payments under a mistake of fact. Nor does that statute of limitations bar recovery of the Debtor's tax overpayments, where such payments were made in the six years preceding the commencement of the Debtor's bankruptcy case.[1]

A. The Voluntary Payment Doctrine Does Not Apply Because The Debtor Operated Under A Mistake Of Fact

The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts and *in the absence of fraud or mistake of material fact or law*." *Kirby McInereny & Squire, LLP v. Hall Charne Burce & Olson, S.C.*, 15 A.D.3d 233, 233 (N.Y. App. Div. 2005) (emphasis added). The caselaw is clear that the voluntary payment doctrine does not apply where payments were made under a mistake of fact, as the case is here.

[1] Section 108 of the Bankruptcy Code tolls the statute of limitations upon the filing of the debtor's bankruptcy case.

Plaintiff has pleaded that its overpayments of real estate taxes were made without full knowledge of the facts, which precludes application of the voluntary payment doctrine. In *Barnam Assoc. v. 196 Owners Corp.*, 56 A.D.3d 309 (N.Y. App. Div. 2008), *rev'd on other grounds*, 899 N.Y.S.2d 724 (N.Y. 2010), the appellate division *rejected* the lower court's application of the voluntary payment doctrine barring a claim for overcharges resulting from defendant's refusal to give effect to applicable abatements, exemptions or refunds in the calculation of tax escalations under the lease because:

> It is undisputed that the real estate tax statements issued by defendant to plaintiff made no mention of . . . abatements and/or refunds in question. *Hence, the voluntary payment doctrine does not apply because full knowledge on the part of plaintiff has not been established.* Defendant attempts to salvage its voluntary payment argument by asserting that plaintiff's representative on the co-op board of directors has been privy to the co-op's financial statements over the years. The argument is unavailing on this appeal, as the record does not include the relevant portions of said financial statements or any proof of their accessibility by plaintiff's representative.

Id. at 311 (emphasis added).

Here, as set forth in the Hoey Declaration, the Debtor did not have knowledge of the tax provisions in the Lease and operated under a mistake of fact that the Debtor was obligated to pay ***all*** real estate taxes, and not just increases in the real estate taxes from the base taxes set forth in the Lease. The Debtor made overpayments of the real estate taxes without full and fair disclosure by the Landlord and without "full knowledge of the fact" that the lease only required the Debtor to pay such increases. Thus, the Debtor's material mistake of fact precludes application of the voluntary payment doctrine and the Defendants' reliance on the doctrine fails as a matter of law. The Court should deny summary judgment on the Second Claim for Relief.

B. The Statute Of Limitations Does Not Bar The Second Claim For Relief

The Defendants contend that Plaintiff's Second Claim for Relief is completely barred by the statute of limitations. In particular, the Defendants argue that because the first tax payment under the Lease occurred more than six years ago, Plaintiff's entire Second Claim for Relief is barred. But the caselaw is squarely to the contrary. New York CPLR § 213 prescribes a six-year period of limitations for breach of contract claims. NY CPLR § 213(2) (McKinney's 2012); *see also Natimir Rest. Supply, Ltd. v. London 62 Co.*, 140 A.D.2d 261, 262 (N.Y. App. Div. 1988). Where a contract requires the payment of money in installments, the statute of limitations accrues separately for each installment. *See Vigilant Ins. Co. of Am. v. Housing Auth. of County of El Paso Tex.*, 87 N.Y.2d 36, 45 (N.Y. 1995); *see also Pagano v. Smith*, 201 A.D.2d 632, 633-34 (N.Y. App. Div. 1994).

New York courts consistently apply this rule to real property lease overcharge disputes, such as the dispute here:

> [I]t is well-established in New York that a cause of action for breach of contract or unjust enrichment arising from a series of installment payments accrues separately for each installment. Several lower courts in New York have applied this rule to real property lease overcharge and nonpayment disputes. This rule conforms with other New York cases holding that, for timeliness purposes, a continuous wrong will give rise to successive causes of action.

See J.C. Penney Corp., Inc. v. Carousel Center Co., 635 F. Supp. 2d 126, 131-32 (N.D.N.Y. 2008).

Thus, contrary to the Defendants' argument, the six-year statute of limitations governing the recovery of overpayments accrues separately for each payment and thereby allows a tenant to recover overpayments made during the six years prior to the commencement of the action. To the extent that Plaintiff seeks to recover real estate tax overpayments made within the last six years, Plaintiff's breach of contract claim is timely and in accordance with long recognized principles of New York law.

Although the Defendants purport to cite a general rule concerning the application of the statute of limitations to rent overcharges, they rely on a narrow which applies only if, *inter alia*, (i) the dispute challenges the *method of calculating* escalation payments, and (ii) the Defendants can establish that the Debtor was provided with all necessary information to contest the purported "formula" or methodology or challenge the accuracy of the tax calculations, but nevertheless failed to commence litigation within six years from that date. *See* Brief in Support of Summary Judgment Motion at 9-10 (citing the exception fashioned in *Goldman Copeland Assocs., P.C. v. Goodstein Bros. & Co.*, 268 A.D.2d 370 (N.Y. App. Div. 2000), and followed in *Kramer Levin Naftalis & Frankel, LLP v. Metro., 919 3rd Ave., LLC*, 791 N.Y.S.2d 318 (N.Y. Sup. Ct. 2004), for the mistaken proposition that "Plaintiff's cause of action for the entirety of the relief sought, if any existed, accrued upon its first payment of real estate taxes in 2003").

The narrow exception does not apply in this case because Plaintiff is not attacking the *method for computing* tax escalations, but rather disputing whether the tax payments that were made should have been made at all. Second, even if the narrow exception did apply, Plaintiff did not obtain constructive knowledge of the method of computation until early 2014, when it first reviewed the Lease provisions with any sort of diligence, in which case ***all*** of the tax overpayments (even the ones made earlier than the prior six years) are subject to recovery. As set forth in the Hoey Declaration, the Debtor asserts that it did not have knowledge of the real estate provisions in the Lease and was not aware of the location of the Lease. These facts must be construed in the light most favorable to the Debtor for the purposes of summary judgment.

The *Goldman Copeland* and *Kramer Levin* decisions are entirely distinguishable because here Plaintiff has pleaded that it did not have the necessary information to determine whether it was obligated to pay all of the real estate taxes on the Premises under the Lease, which allegations must be accepted as true and afforded the benefit of every favorable inference for summary judgment.

Rather, this case is similar to *J.C. Penney Corp. v. Carousel Center Co.*, where the district court rejected the landlords' reliance on the exception to the general rule and denied their motion to dismiss the tenant's breach of contract claim arising from alleged miscalculations under certain tax escalation provisions in their commercial leases for overpayments made six years prior to the commencement of the action. 635 F. Supp. 2d at 131-34. There, the tenant was responsible to pay 100% of the amount by which the taxes for any given year exceeded the base taxes. *Id.* at 130. The tenant claimed that it was invoiced and paid more than $1 million in excess of the actual amount owed under the lease for such increased taxes. *Id.* The landlord argued that the tenant was time-barred from recovering overpayments because it had constructive knowledge of their computational methods since it first received and paid certain tax bills. *Id.* at 132-34.

In denying the landlords' motion to dismiss, the *J.C. Penney* court held that the landlords failed to meet their burden to establish that the tenant had notice of their computational methods, in part because their defense relied upon facts beyond the scope of the pleadings that "have yet to be developed." *Id.* at 133. The pleadings were insufficient to establish what information the landlords' tax bills contained or what other information might have been available to the tenant. *Id.* Also, in *J.C. Penney*, just like the case at bar, landlord's unconvincing claim that the tenant could have obtained information regarding the propriety of landlords' conduct through the exercise of reasonable diligence (*e.g.*, a review of matters of the public record), improperly assumed facts outside of the pleadings -- even assuming the tenant had that duty of inquiry. *Id.*

Accordingly, the statute of limitations does not bar Plaintiff from seeking to recover tax overpayments, to the extent that the payments were made in the six years prior to the commencement of the Debtor's bankruptcy case.

II. SUMMARY JUDGMENT SHOULD BE DENIED ON THE SIXTH CLAIM FOR RELIEF

In order for a plaintiff to make out a claim for the tort of interference with prospective economic advantage, "a plaintiff must show (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." *Purgess v. Sharrock*, 33 F.3d 134, 141 (2d. Cir.1994); *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003). In *Purgess*, the court found that a prior employer that was unresponsive to requests for information about a job-seeker was potentially liable for interference with a prospective economic advantage, as a result of the plaintiff's difficulty in securing employment. This tort "usually involves interference with a business relationship not amounting to a contract." *Volvo North America Corporation v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d. Cir. 1988). In *Volvo*, the court stated:

> In light of this standard, we believe that the district court erred in dismissing Volvo's claim for tortious interference. Volvo has alleged that MIPTC interfered with Volvo's relations with various parties. Paragraph 89 of the amended complaint, for example, alleges that "the defendants have embarked on a program to persuade or intimidate television networks and tournament owners, producers and directors to interfere with Volvo's reasonable promotional activities in connection with its ownership, production, and sponsorship of various tennis events." ....In our view, these allegations state a claim for relief on the ground of

> interference with prospective business relations. Although Volvo does not allege any particular contract that was lost as a result of appellees' activities, Volvo does allege the requisite interference for the purpose of harming Volvo.

Volvo North America Corporation, 857 F.2d at 74.

Here the Debtor alleges that the Defendants sought, through a combination of communications and behavior, to dissuade All Island from investing in the Debtor's business. *See* Complaint ¶¶ 36, 37. Thus, Plaintiff has at a minimum raised genuine disputes as to material facts regarding whether the Defendants' actions constituted tortious interference. Summary judgment on the Sixth Claim for Relief should be denied.

III. SUMMARY JUDGMENT SHOULD BE DENIED ON THE SEVENTH CLAIM FOR RELIEF

Similarly, the Defendants seek judgment on the Seventh Claim for Relief on the basis that their version of the disputed facts should be resolved in their favor. *See* Brief in Support of Motion for Summary Judgment at 15 (insisting upon the truth of the following statements: "(i) Defendants never used any of Plaintiff's trade secrets or other proprietary information as it never possessed any, (ii) Defendants never took or used Plaintiff's property after temporarily taking possession of the Premises, and (iii) Defendants never accessed Plaintiff's computer systems"). Here, as set forth in the Hoey Declaration and Ferretti Declaration, the Debtor has disputed each of the "undisputed facts" relied upon by the Defendants' to support summary judgment. The allegations set forth in the Ferretti Declaration alone bring the Seventh Claim for Relief outside the scope of summary judgment. The Defendants claims they never accessed the Debtor's computer systems. A third party IT technician states otherwise. This is the epitome of a genuine issue of material fact.

The Defendants ask this Court to invert the summary judgment standard and require facts to be construed in the manner most favorable to the *Defendants*, and resolve all ambiguities and draws all reasonable inferences against *Plaintiff.* However, as the non-moving party, Plaintiff is entitled to have facts construed in its favor and reasonable inferences drawn against the Defendants. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). This fundamental misconception of the summary judgment standard is a sufficient ground to deny the Summary Judgment Motion as to the Seventh Claim for Relief.

IV. THE SUMMARY JUDGMENT MOTION SHOULD BE DENIED PURSUANT TO FRCP 56(d) BECAUSE PLAINTIFF REQUIRES DISCOVERY TO PRESENT FACTS ESSENTIAL TO ITS OPPOSITION TO SUMMARY JUDGMENT

In the alternative, the Court should deny the Summary Judgment Motion pursuant to Rule 56(d) because the factual record is nowhere near complete in this case and Plaintiff has not had an opportunity to conduct necessary discovery. Rule 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).[2]

Consistent with the purpose of Rule 56, the Second Circuit has observed:

> [S]ummary judgment should only be granted if *after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment. Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.

Hellstrom, M.D. v. U.S Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (citations, alterations and quotations omitted; emphasis in original). In the *Hellstrom* case, the Second Circuit vacated and remanded the district court's grant of summary judgment where the plaintiff

[2] Rule 56 was amended in 2010. Subdivision (d) carried forward without substantial change the provisions of former subdivision (f).

was not given a sufficient opportunity to conduct discovery to support his claim that the defendant Veteran's Administration demoted him based on his protected speech. *Id.* at 98-99.

To seek relief under Rule 56(d), non-moving party must file an affidavit "explaining: 1) the nature of the uncompleted discovery, i.e., what facts are sought and how they are to be obtained; and 2) how those facts are reasonably expected to create a genuine issue of material fact; and 3) what efforts the affiant has made to obtain those facts; and 4) why those efforts were unsuccessful." *Starkey v. Capstone Enters. of Portchester, Inc.*, 237 F.R.D. 46, 49 (S.D.N.Y. 2006) *(citations and quotations omitted). The Hoey Declaration satisfies these requirements.

As set forth in the Hoey Declaration, there has been limited opportunity for discovery, and there appear to be significant and genuine issues of material fact to be tried as to the Second, Sixth and Seventh Claims for Relief. Depositions of Defendants James Balducci and John Balducci Jr. and all document and other discovery were limited in scope to the "Issue," defined in the Court's Order (the "June 24, 2014 Pretrial Order") [Docket No. 24] as whether the Debtor surrendered the Lease to the Landlord pre-petition by its conduct and/or by operation of law. Defendant Christos Carambelas has not yet been deposed at all.

There has been no opportunity for non-party discovery, including such critical persons as John Balducci, Sr. Plaintiff may not be able to obtain testimony by affidavit from the principals of All Island. Because those parties are not under Plaintiff's control, they must be contacted through counsel and the expedited discovery schedule has not made this possible. Plaintiff should have an opportunity to obtain appropriate testimony by affidavit or deposition.

The Debtor expects that discovery would focus on the following matters:

a) Whether the Debtor and the Landlord were operating under a mistake of fact as to the allocation of payment of real estate taxes.

b) Whether the parties affiliated with and aligned in interest with the Landlord were executing a previously developed plan, at the time of the self-help eviction, to obtain the use of the Debtor's ripening rooms.

c) The knowledge of the Landlord's employees as to the Debtor's customer lists, routes and other intellectual property.

The Court decided, based upon the needs of the case, to proceed to discovery only under the Issue as framed in the Court's June 24, 2014 Pretrial Order. The Court held an evidentiary hearing pursuant to this order on July 24, 2014, which has been continued to August 7, 2014.

The Debtor intends to complete the depositions of James Balducci and John Balducci, Jr. after the conclusion of the trial on the Issue, and depose Christo Carambeles, Frank Mauro, Kevin Crimmins, and other employees and/or independent contractors previously employed or engaged by the Debtor and now employed or engaged by parties aligned in interest with the Landlord. Additionally, deposition and document discovery may be sought from parties providing technical support to the Landlord and parties aligned in interest with the Landlord, and from parties engaged in the negotiation of the Lease.

The incomplete discovery as outlined herein underscores the impropriety of the Defendants' Summary Judgment Motion at this time. Accordingly, the Court should deny the Summary Judgment Motion, or at a minimum, defer consideration of the motion until all discovery has been completed.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendants' Summary Judgment Motion, and grant Plaintiff such other and further relief as the Court deems just and proper.

Dated: July 28, 2014
New York, New York

Respectfully submitted,

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